

1 Randall J. Sunshine (SBN 137363)
rsunshine@linerlaw.com
2 Angela C. Agrusa (SBN 131337)
aagrusa@linerlaw.com
3 Sterling L. Cluff (SBN 267142)
scluff@linerlaw.com
4 LINER GRODE STEIN YANKELEVITZ
SUNSHINE REGENSTREIF & TAYLOR LLP
5 1100 Glendon Avenue, 14th Floor
Los Angeles, California 90024.3503
6 Telephone: (310) 500-3500
Facsimile: (310) 500-3501

7 Attorneys for Defendant
8 HILTON GRAND VACATIONS COMPANY, LLC

9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11

12 BRIAN CONNELLY, MARY ALICIA
SIKES, and KEITH MERRITT on
13 behalf of themselves and all others
similarly situated,

14 Plaintiffs,

15 vs.

16 HILTON GRAND VACATIONS
17 COMPANY, LLC,

18 Defendant.

Case No. CV12-0599 JLS (KSC)

**DEFENDANT HILTON GRAND
VACATIONS COMPANY, LLC'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION**

Date: June 28, 2013
Time: 1:30 p.m.
Crtrm.: 4A

The Hon. Janis L. Sammartino

Date Action Filed: March 12, 2012

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1 **I. INTRODUCTION**

2 Plaintiffs Brian Connelly and Keith Merritt seek to certify a class of hotel
 3 guests who are “fed up” and “annoyed” by telephone calls from Hilton Grand
 4 Vacations Company, LLC (“HGV”). However, Plaintiffs cannot certify a class based
 5 on the idiosyncratic and inherently individualized emotional response that consumers
 6 had to receiving a telephone call from a hotel brand with which they have a
 7 longstanding relationship and demonstrated loyalty. Moreover, Plaintiffs’ claim for
 8 aggregated statutory damages for as much as \$18 to \$57 billion as compensation for
 9 being fed up and annoyed is without any legal or factual support under the Telephone
 10 Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A) (“TCPA”); it is unconscionable
 11 on every level.

12 The TCPA was enacted to protect against “the proliferation of intrusive,
 13 nuisance calls.” *Mims v. Arrow Fin. Servs.*, 132 S. Ct. 740, 744 (2012).
 14 Nevertheless, the TCPA’s private right of action and statutory damages provision of
 15 \$500 per call has resulted in the increase of federal lawsuits brought under the TCPA
 16 by more than 500% between 2008 and 2011. *See* In the Matter of Rules and
 17 Regulations Implementing the TCPA of 1991, Commc’n Innovators Pet. for Decl.
 18 Ruling, Comments of the U.S. Chamber of Commerce, CG Docket 02-278, p. 5.
 19 “Like many statutes . . . remedial laws can themselves be abused and perverted into
 20 money-making vehicles for individuals and lawyers. This may be one of those
 21 cases.” *Saunders v. NCO Fin. Sys., Inc.*, No. 12-CV-1750 BMC, 2012 WL 6644278,
 22 *3 (E.D.N.Y. Dec. 19, 2012) (plaintiff’s case failed under the TCPA because he gave
 23 “prior express consent” to be contacted by defendant).

24 In fact, within the last 60 days (and as recently as last week), courts have
 25 refused to grant class certification cases that clearly abuse the TCPA and class action
 26 law. *See, e.g., Gannon v. Network Tel. Servs., Inc.*, No. 2:12-cv-09777-RGK-PJW,
 27 2013 WL 2450199, at *2-3 (C.D. Cal. June 5, 2013) (class certification “improper”
 28 because the facts of the case would require the court to hold “mini-trials” to

1 determine who received unauthorized text messages in order to determine class
 2 membership); *Machesney v. Lar-Brev of Howell, Inc.*, No. 10-10085, 2013 WL
 3 1721150, at *18 (E.D. Mich. Apr. 22, 2013) (denying certification where the class
 4 definition yielded multiple plaintiffs stemming from one potential violation); *Jamison*
 5 *v. First Credit Servs., Inc.*, No. 12-C-4415, 2013 WL 1248306, at *15-16 (N.D. Ill.
 6 Mar. 28, 2013) (denying certification where the class definition included thousands of
 7 individuals who consented to receiving calls on their cellular telephones and thus had
 8 no grievance under the TCPA). Plaintiffs' action here, premised upon even more
 9 tenuous allegations, demands a similar outcome.

10 Indeed, Plaintiffs, who suffered no harm or injury, are not only unable to
 11 establish any actionable claim for violations of the TCPA, they cannot meet the
 12 necessary requirements for class certification. Plaintiffs Messrs. Connelly and
 13 Merritt, HHonors Members and loyal Hilton Guests, each consented to calls from
 14 HGV by willingly and deliberately giving their cellular telephone numbers as their
 15 preferred means to be contacted. HGV is a subsidiary of Hilton Worldwide, Inc.
 16 ("Hilton") that provides unique travel opportunities to members of the Hilton family.
 17 HGV develops, manages, markets and operates a system of exclusive, high-end
 18 resorts that members of the Hilton family can jointly-own along with other Hilton
 19 family members. Ownership of an HGV interest entitles members to exclusive use of
 20 the properties and the exchange of visits to other HGV resorts worldwide. HGV
 21 advertises its resort properties through direct telephone marketing solely to guests of
 22 the Hilton family of hotels ("Hilton Guests") and Hilton HHonors Program members
 23 ("HHonors Members"), and offers incredible savings for travel as an incentive to its
 24 loyal customers to learn about HGV's ownership properties. Hilton does not make
 25 cold-calls or call people who are not otherwise a part of the Hilton family and who
 26 have voluntarily provided their contact information to Hilton.

27 In light of these facts, the Court must deny class certification for the following
 28 reasons:

1 First, Plaintiffs fail to adequately define a class that is ascertainable using
 2 objective criteria. The proposed class definitions would improperly require the Court
 3 to decide individuals' ability to prevail on their claims in order to determine
 4 membership in the class. The proposed classes would require individual inquiries
 5 concerning, for example, whether HGV called cell numbers belonging to potential
 6 class members and the manner in which potential class members consented to
 7 receiving calls from HGV.

8 Second, Plaintiffs cannot show commonality as individual issues predominate
 9 within each of the proposed classes, including how members of the putative classes
 10 consented to the calls, how HGV dialed cell numbers, and the non-common,
 11 individual ways in which HGV connected with the putative class.

12 Third, Plaintiffs' claims are not typical of all those in the putative class because
 13 the manner in which members of the putative class provided consent varied.

14 Fourth, class certification should be denied because it is not the superior
 15 method of adjudication of a TCPA claim. The drafters of the TCPA intended for the
 16 available statutory damages remedy to motivate plaintiffs to bring individual actions,
 17 rendering class action treatment unnecessary. This is underscored by the fact that
 18 statutory damages in this case would yield potential damages in the billion dollar
 19 range. These numbers are grossly disproportionate to actual harm suffered by the
 20 proposed class, evidencing that class wide treatment is inappropriate.¹

21 **II. STATEMENT OF FACTS**

22 **A. HGV's Telephone Marketing Activities**

23 HGV employs a specific, narrowly tailored telephone marketing plan to
 24 introduce its resort properties to those Hilton customers that HGV has determined
 25 may have interest in the advantage of the ownership opportunities with Hilton. Those

26 ¹ Plaintiffs' argument that their request for class certification is based primarily on
 27 injunctive relief is disingenuous. Injunctive relief is merely an ancillary remedy to
 28 this financially driven class action.

1 customers are select Hilton Guests and HHonors Members. Gust Decl. ¶¶ 3-4.
 2 HHonors Members are those guests who have applied for and participate in the
 3 Hilton HHonors loyalty program, an exclusive points-based loyalty program (the
 4 “HHonors Program”), and Hilton Guests are those persons who stayed at the Hilton
 5 family of brand hotels.

6 Through its marketing campaign, HGV invites select Hilton Guests and
 7 HHonors Members to learn about its resort properties by offering significantly
 8 discounted vacations at Hilton Brands, brands for which they have an ongoing
 9 preference and relationship. Gust Decl. ¶¶ 3-6. In exchange, Hilton Guests and
 10 HHonors Members tour the resort property and learn more about ownership
 11 opportunities during their stay.² HGV directs these efforts exclusively to select
 12 Hilton Guests and HHonors Members; it does not cold call or solicit non-Hilton
 13 customers or persons who have not otherwise opted to receive marketing from HGV.
 14 Gust Decl. ¶ 4. HGV’s efforts are directed toward select persons that HGV has
 15 determined, through its internal evaluation, are inclined to be interested in ownership
 16 opportunities at HGV properties. Additionally, those Hilton Guests and HHonors
 17 Members that are contacted voluntarily provided their cell number and agreed to be
 18 contacted at that number. Cluff Decl. Exh. A 13:20-14:12; Exh B. 139:16-23; Gust
 19 Decl. ¶¶ 11-13.

20 One of HGV’s primary focuses in crafting its telemarketing strategy was to
 21 ensure compliance with the TCPA and similar laws. Gust Decl. ¶¶ 9-10; Allen Decl.
 22 ¶ 2; Cluff Decl. Ex. A 73:9-74:24. To that end, HGV purchased the Liberation 6000
 23 system (“Liberation”) because “[TDI, Inc.] worked specifically with the FTC and
 24 FCC to build a system that complied with all the rules and regulations, and built it in
 25 _____

26 ² Packages range from two to five nights in Orlando, Las Vegas, Manhattan,
 27 Honolulu, Waikoloa, Myrtle Beach, or Park City for as little as \$149 a night. Offers
 28 may also include gifts such as HHonors points, theme park tickets, gift certificates for
 rebates on flights and/or additional hotel stays. Gust Decl. ¶ 4-5.

1 collaboration with those governmental entities.” Cluff Decl. Exh. A 73:9-24.

2 Liberation has the ability to utilize separate equipment and programs for calls
3 to landline telephones (“Landline Equipment”) versus calls to cellular telephones
4 (“Cellular Equipment”); this functionality was a key factor in HGV’s decision to
5 purchase Liberation. Allen Decl. ¶ 3. The Cellular and Landline Equipment “work
6 completely differently” and utilize different software and hardware. Cluff Decl. Exh.
7 A 51:12-54:3; 114:6-115:18; 175:19-179:4; 181:14-184:9; 184:20-185:18; 193:20-
8 195:7; Exh. B 88:18-90:18; 117:2-119:13; 123:3-124:9; 138:6-139:13; 142:11-
9 144:15; 184:21-190:20; 196:16-199:24. The Landline Equipment, running in
10 “Predictive Mode,” uses a pacer, call progress analysis and related software to
11 automatically dial landline telephone numbers and route the calls if the software
12 detects a live human response; the Cellular Equipment does not utilize this equipment
13 and cannot achieve this functionality. *Id.*

14 By contrast, the Cellular Equipment intentionally prevents cell numbers from
15 being dialed without human intervention. Allen Decl. ¶ 5; Cluff Decl. Exh. A 51:12-
16 54:3; 73:9-74:24; 114:6-115:18; 175:19-179:5; 181:14-184:9; 184:20-185:18;
17 193:20-195:7. As HGV’s Vice President of Marketing, Mr. Gust, testified:

18 [C]ellular telephones can never be dialed without a human initiating the
19 call by pressing dial now, listening to the entire process of the call,
20 listening to the dial tone, listening to the ring, listening for an answering
21 machine, listening for a human response, and then engaging the
customer. And then post call, dispositioning what happened on the call
before any other – before they can take another call or initiate another
call.

22 Cluff Decl. Exh. A 114:9-17.

23 To further ensure compliance with the TCPA, HGV employs a data “hygiene
24 process” to ensure compliance with the TCPA by verifying that the numbers it
25 receives for HHonors Members and Hilton Guests are correctly designated as a
26 landline or cell number. Cluff Decl. Ex. A 13:24-14:12; 54:4-62:10; 185:1-18; Ex. B
27 36:16-37:5; 40:10-45:18; 70:15-73:25. After undergoing the hygiene process, cell
28 numbers are separated from landline numbers and are then called, one at a time, by

agents using the Cellular Equipment. Cluff Decl. Exh. B 52:23-53:7; Allen Decl. ¶¶ 4-7.³

Inexplicably, Plaintiffs claim that they were inundated with calls from HGV that were made using an ATDS because each call had a delay prior to a live person coming on the line. Ptf.' Mot. 2:13-19. However, Plaintiffs only spoke to HGV agents three times in four years and none of those calls involved a delay. Allen Decl. ¶ 5.

B. HHonors Members Voluntarily Provide Their Cell Numbers And Consent To Being Contacted In Several Non-Common Ways

Guests may apply to become HHonors Members and consent to receive calls in a variety of ways. Gust Decl. ¶¶ 10-11. Guests may enroll by submitting a paper enrollment application by mail, enrolling in person at a Hilton hotel, via telephone or by completing enrollment online. Cluff Decl. Exh. A. 41:9-16; 123:6-135:8; 153:12-154:15; Gust Decl. ¶ 12. These enrollment methods are significantly different from one another and, consequently, individual experiences of the HHonors Members vary drastically from person to person. Gust Decl. ¶¶ 12-17. These differences, described further below, evidence the lack of commonality for the putative class as follows:

Online Application. Online enrollment includes fields for the applicants' first and last name, mailing address, email address, and telephone number and type. With the exception of "telephone number," these fields are preceded by asterisks indicating that the field is required. Gust Decl. ¶ 15, Exh. N. Online applicants are also required to accept the Terms and Conditions of the HHonors Program. Gust Decl. ¶¶ 14-15, Exh. N.

³ Plaintiffs misattribute Mr. Allen's testimony about Landline Equipment to Cellular Equipment. Ptf.' Mot. 7:17-10:10. When asked whether the Cellular Equipment had the capacity to automatically dial cell numbers, Mr. Allen unequivocally and repeatedly stated, "No, not in the way it's been configured." Cluff Decl. Exh. B 164:11-22.

Specifically, Mr. Connelly enrolled in the HHonors Program online and *voluntarily* provided Hilton with his cell number during that process. Gust Decl. ¶¶ 16. During his online application process, Mr. Connelly clicked a box indicating that by creating his HHonors account, he “agree[d] to the HHonors Program Terms and Conditions, our Expiration Policy, and our Global Privacy Policy (Updated Dec 2011).” Gust Decl. ¶¶ 15-16. Each of these documents is easily accessible for review by a visible and obvious hyperlink. *Id.* By checking the box, Mr. Connelly and the other putative class members who applied to be HHonors Members online agreed to the HHonors Terms and Conditions, which state:

We process your personal information in accordance with the Hilton Global Privacy Policy (the “Privacy Policy”).

We may also use and share your personal information in the ways described below, in addition to what is described in the Privacy Policy. These Terms and Conditions supplement the Privacy Policy with respect to our processing of the personal information of HHonors Program Members. . . .

In addition to the uses and sharing described in the Privacy Policy, we may use and share relevant portions of your personal information in order to administer the HHonors Program. This may include sharing your personal information with our business partners in order to credit you with mileage or other benefits earned through your participation in the HHonors Program.

Gust Decl. Exh. R, HGV5485-5486.⁴

By checking the box, Mr. Connelly and the putative class members who enrolled online agreed to Hilton’s Global Privacy Policy, which states that:

We use your personal information to provide the *services you request* from Hilton such as to *facilitate: reservations; the purchase of a vacation package or timeshare*; purchases from the Hilton To HomeT; the booking of airfares and rental cars; membership in the HHonors program; and other transactions. . . . We also use details to send you newsletters, promotions and featured specials, and to conduct online

⁴ HGV’s calls to Mr. Connelly were initially covered by the 2010 version of the HHonors Terms & Conditions. The 2006 version in place when Mr. Connelly joined the HHonors Program provides that his “continued use in the HHonors Program following the posting of changes to these terms will mean that you accept these changes.” Gust Decl. Exh. S, HGV080.

1 surveys, sweepstakes, prize draws, and other contests via email,
2 telephone or postal mail.

3 Gust Decl. Exh. T, HGV119 (emphasis added).⁵

4 ***Paper Application.*** Persons who enroll in the HHonors Program through paper
5 applications have a different experience than persons who enroll online. Paper
6 applications contain a space for the applicant to provide a telephone number.
7 However, there is no indication that a telephone number is required. Gust Decl. ¶¶
8 12-13, 17; Exh. O. While online applicants check a box agreeing to the HHonors
9 Terms and Conditions and Hilton's Global Privacy Policy, the paper application
10 advises applicants that:

11 By submitting this form, you agree to the HHonors Terms and
12 Conditions and the Privacy Policy located on our website and available
13 at the front desk. ***You also acknowledge and agree that your personal***
14 ***information will be used to: administer the HHonors program, provide***
services and products, analyze your travel accommodation preferences,
make special offers or promotions by email, telephone or post, as well
as for other purposes detailed in our Privacy Policy.

15 Gust Decl. Exh. O.

16 ***Telephone Application.*** Finally, while the telephone application requests the
17 same contact information as the online and paper applications, there is no uniform
18 script or process by which members are enrolled in the HHonors Program via
19 telephone. Gust Decl. ¶¶ 12,14-18. Some telephone applicants are prompted to
20 respond through an automated questionnaire, while others speak with a live Hhonors
21 Program representative. *Id.*

22 C. **Hilton Guests Voluntarily Provide Their Cell Numbers and Consent**
23 **to Being Contacted In Non-Common Ways**

24 Hilton Guests voluntarily provide cell numbers to Hilton and consent to
25 Hilton's Global Privacy Policy in various ways depending on whether the Hilton

26 ⁵ Hilton's Global Privacy Policy was updated in December 2011 and clarified that
27 Hilton would contact individuals "online and via email, telephone, mobile/text
28 message (including SMS and MMS) and postal mail." Gust Decl. Exh. U, HGV108.

1 Guest made a reservation online, by telephone, or through online travel agencies like
 2 Expedia, Orbitz and Travelocity (“OTAs”), traditional travel agents, third parties
 3 (e.g., spouse, business partner, friend) or in person at the time of check in.⁶ Gust
 4 Decl. ¶¶ 19-25.

5 **Online Reservations.** While booking their hotel stays online, Mr. Connelly
 6 and various members of the putative class voluntarily provided their cell number to
 7 Hilton and agreed to Hilton’s Global Privacy Policy. Cluff Decl. Exh. C 35:14-
 8 37:20; 38:17-41:24; 95:9-19; 106:21-108:12; 112:4-12; Gust Decl. ¶¶ 19-21; Exh. L
 9 HGV1441-1442. During the online reservation process, Hilton advises guests of
 10 Hilton’s Global Privacy Policy prior to requesting the guest’s contact information.
 11 Guests receive additional notice of Hilton’s Global Privacy Policy in an email
 12 confirming their reservation. Gust Decl. ¶¶ 21, 23-24; Cluff Decl. Exh. K,
 13 CONNELLY010-012, 017-018.

14 **Phone Reservations.** Mr. Merritt and other members of the putative class
 15 booked their hotel reservations by phone. Because telephone reservations are not
 16 taken pursuant to a script, there is no way of uniformly determining what was said to
 17 those guests about Hilton’s Global Privacy Policy during their telephone reservation.⁷
 18 Cluff Decl. Exh. D 39:2-40:13; 41:24-45:6; 264:15-269:19; Gust Decl. ¶ 22. After
 19 making the telephone reservation, approximately 85% of the guests received a
 20 confirmation of their reservation notifying them of Hilton’s Global Privacy Policy.

21 ⁶ A guest’s first and last name, email and physical address are required to make a
 22 reservation. Gust Decl. ¶ 19. A telephone number may or may not be required
 23 depending on the hotel. *Id.* Cell numbers are *never* required.

24 ⁷ Mr. Merritt claims that at the Saratoga Hilton the front desk clerk said “no, no, no
 25 its [sic] like, we’re not going to call you or anything, and he made a joke about it, and
 26 then he said its [sic] like if you leave your wallet in your room or something, we can
 27 give you a call and tell you we found your property.” Cluff Decl. Exh. D 20:9-21:7;
 28 302:19-308:17, Exh. E, Resp. No. 19; Exh. F, Resp. No. 2. However, when Mr.
 Merritt checked in to the Hilton Doubletree, he was not asked for his telephone
 number. Cluff Decl. Exh. D 41:14-43:15.

1 Gust Decl. ¶ 22; Cluff Decl. Exh. K CONNELLY001-005. Because telephone
 2 reservations are handled differently depending on the course of the call, individuals
 3 who made reservations by telephone would need to be examined to determine what
 4 information each received with respect to Hilton's Global Privacy Policy and whether
 5 each received a confirming email including Hilton's Global Privacy Policy.

6 ***OTA/Travel Agent Reservations.*** Other Hilton Guests and putative class
 7 members booked reservations through OTAs or traditional travel agents. Cluff Decl.
 8 Exh. A 17:13-21:19; 32:5-34:2; Exh. D 268:8-269:12; Gust Decl. ¶¶ 23-26. In these
 9 instances, all interaction with Hilton was done exclusively through the OTA or travel
 10 agent. Gust Decl. ¶¶ 23-26. As such (and unlike guests who booked directly through
 11 Hilton), individuals who utilized OTAs and travel agents may not have voluntarily
 12 provided their cell numbers or received direct notice of Hilton's Global Privacy
 13 Policy. The guest interacts directly with the OTA or travel agent, who in turn
 14 interacts with Hilton; there is no direct contact between the guest and Hilton until the
 15 guest checks in to the Hilton hotel.

16 Many OTAs and travel agents have their own independent terms and
 17 conditions and privacy policies that govern the reservations they make for customers,
 18 which may or may not have directed the putative class members to review Hilton's
 19 policies. *Id.* Thus, all reservations made through an OTA or travel agent must be
 20 reviewed to determine whether the putative class members utilizing those services
 21 consented to receiving calls from HGV.

22 ***Third Party Reservations.*** Some putative class members (including Mr.
 23 Merritt) may have made reservations through a third party such as a spouse, partner,
 24 secretary or friend. Cluff Decl. Exh. D 265:6-267:6; Gust Decl. ¶¶ 22, 25. That third
 25 party may have provided the class member's contact information and consented to
 26 Hilton's Global Privacy Policy without the putative class member's knowledge,
 27 consent, and/or understanding of what he or she was consenting to. Cluff Decl. Exh.
 28 D 265:6-267:6; Gust Decl. ¶ 25. Thus, each putative subclass member would have to

1 disclose whether he or she: (1) authorized the third party to provide the cell number;
 2 (2) authorized the third party to consent to Hilton's Global Privacy Policy; (3) was
 3 notified of the existence of Hilton's Global Privacy Policy by the third party; and
 4 (4) understood he or she was consenting to being contacted via cell number.

5 ***Check In Process.*** Individuals may also provide their cell numbers during
 6 check in if that information has changed or was not previously provided to Hilton.
 7 Gust Decl. ¶ 26. Hilton's employees are encouraged to confirm existing contact
 8 information and ask for any missing information. *Id.* However, there is no script for
 9 the check in process. Accordingly, there is no way to determine which guests
 10 voluntarily provided their cell numbers, received representations regarding the use of
 11 the cell number, or were advised or already aware of Hilton's Global Privacy Policy
 12 during the check in process. *Id.* Thus, each putative class member who provided a
 13 cell number during check in would have to disclose whether he or she: (1) received
 14 representations regarding Hilton's use of the cell number; (2) received Hilton's
 15 Global Privacy Policy or representations about it; and (3) understood he or she was
 16 consenting to being contacted via cell number.

17 **D. Individual Inquiries Would Be Necessary To Determine If An**
 18 **HHonors Member And/Or Hilton Guest Received A Call On A**
 19 **Cellular Telephone**

20 Specific inquiry into each putative class member's phone records and
 21 experiences is necessary to determine whether he or she falls within the class
 22 definition; one cannot merely review HGV's records to determine with certainty
 23 whether dialed calls were received on a cellular telephone. There are at least three
 24 circumstances requiring specific inquiry or examination of the individual putative
 25 class member's telephone records to determine whether he or she falls within the
 26 class definition.

27 First, while telephone numbers obtained through voice over internet protocol
 28 ("VoIP") services such as Google Voice, Skype or GrooveIP may *appear* to be cell

1 numbers, they are not. Allen Decl. ¶ 9. In fact, VoIP numbers are not tethered to a
 2 single cellular telephone, but rather allow the subscriber to receive calls on any
 3 internet capable device, including computers, tablets, smart phones, and even landline
 4 telephones. Specific inquiry would need to be conducted into *each* apparent cell
 5 number to determine that it is not a VoIP number and may be included in the class.
 6 Cluff Decl. Exh. A 69:5-70:19; Allen Decl. ¶¶ 9, 12.

7 Second, certain calls may have ultimately connected with a cellular phone for
 8 reasons beyond HGV's control. For example, when a guest forwards his or her
 9 landline number to a cell number, HGV has no way to detect that this has occurred.
 10 As one example, HGV's telephone records reflect that HGV called former plaintiff
 11 Mary Alicia Sikes exclusively on her landline number. Gust Decl. Exh. P; Cluff
 12 Decl. Exh. A 112:5-113:1; 185:1-18; Exh. B 81:8-13; 205:9-206:24; Gust Decl. Exh.
 13 Q, HGV1373; Allen Decl. ¶¶ 9-10. Ms. Sikes likely caused the call to connect with
 14 her cell phone, however, by using the call forwarding function on her landline
 15 telephone. Cluff Decl. Exh. H, Resp. Nos. 2-3; Exh. G, AT&TSIKES136; Gust Decl.
 16 Exh. Q; Allen Decl. ¶ 10.

17 HGV has no responsibility or liability for these calls. Yet, if liability were
 18 somehow imputed, in order to determine when and if putative class members
 19 forwarded calls from their landlines to their cell phones, HGV's records would have
 20 to be compared with the cell phone records of each individual member of the putative
 21 class.⁸ This process would require rigorous and tedious individualized inquiries.

22 _____
 23 ⁸ In a "narrow" or limited set of circumstances, it may be possible that HGV dialed a
 24 landline number that had been "ported" to a cell number. Porting occurs when a
 25 consumer elects to move his or her existing telephone number from a landline
 26 number to a cell number (or vice versa), thereby keeping their existing phone number
 27 but switching the type of telephone on which calls are received. Cluff Decl. Exh. A
 28 68:11-69:4; Exh. B 78:7-15; 79:20-80:12; Allen Decl. ¶ 8. Although HGV makes
 efforts to identify and address numbers that have been "ported" from landlines to cell
 numbers, it is possible that some were missed. Significantly, there is no way to

1 Third, HGV's records demonstrate that many potential members of the putative
 2 class incorrectly claim to have received calls from HGV. In such instances, HGV's
 3 telephone records would need to be compared with each individual putative class
 4 member's telephone record to verify the validity of his or her inclusion within the
 5 class. For example, Mr. Merritt claims to have received an additional call from HGV
 6 on either December 28 or December 29, 2011. This call cannot be proven by
 7 reference to either HGV's call records or Mr. Merritt's cell phone records. Cluff
 8 Decl. Exh. D 194:2-15; 205:5-23; 222:20-223:7; Exh. E, Resp Nos. 2-3; Gust Decl.
 9 Exh. Q.

10 **III. PLAINTIFFS FAIL TO MEET THEIR BURDEN OF ESTABLISHING** 11 **THE PROPRIETY OF CLASS CERTIFICATION**

12 Plaintiffs bear the burden of establishing the propriety of class certification,
 13 which includes establishing an ascertainable class, and demonstrating that the
 14 numerosity, commonality, typicality and adequacy requirements of Federal Rule of
 15 Civil Procedure 23(a) and one of the provisions of Rule 23(b) are satisfied. *Amchem*
 16 *Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231 (1997); *Hanon v.*
 17 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Rule 23 does not set forth a
 18 mere pleading standard." *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Rather,
 19 "[a] party seeking class certification must affirmatively demonstrate his compliance
 20 with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently
 21 numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original).
 22 Certification is proper only if, after "rigorous analysis," which may entail some
 23 overlap with the merits of the plaintiffs' claims, the prerequisites of Rule 23 are
 24 satisfied. *Id.* at 2551. Because Plaintiffs have failed to meet their burden of
 25 establishing the prerequisites to class certification, their motion must be denied.

26 _____
 27 identify when a ported call resulted in a call received on a cell number that had been
 28 dialed using a landline number without an examination of the individual telephone
 records of each individual putative class member. Allen Decl. ¶ 11.

1 **A. The Putative Class and Subclasses Are Not Ascertainable**

2 “Before a class may be certified, it is axiomatic that such a class must be
3 ascertainable.” *Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 557 (C.D. Cal.
4 2012) (citation omitted). A class cannot be certified if a plaintiff has not
5 “establish[ed] an objective way to determine” who is a member of the class.
6 *Williams v. Oberon Media, Inc.*, 468 F. App’x 768, 770 (9th Cir. 2012) (affirming
7 denial of class certification for lack of ascertainability). Where the determination of
8 who is in the class would require the court to “delve into the issues of liability,” the
9 class is not ascertainable, and class certification is improper. *Vandervort*, 287 F.R.D.
10 at 557-58.

11 Here, the class is not ascertainable because this Court would have to delve into
12 the merits and hold mini-trials to determine which individuals consented to receiving
13 phone calls from HGV.⁹ This conclusion is supported by the numerous recent
14 decisions denying class certification, holding that evidence demonstrating that class
15 members consented to the cellular calls renders the class unascertainable. *See, e.g.*,
16 *Gannon v. Network Tel. Servs., Inc.*, No. 2:12-cv-09777-RGK-PJW, 2013 WL
17 2450199, at *2-3 (C.D. Cal. June 5, 2013) (denying certification for lack of
18 ascertainability where the facts of the case would require the court to hold “mini-
19 trials” to determine who consented to receiving text messages); *Machesney v. Lar-*

20
21 ⁹ Courts have routinely held that where the plaintiff has voluntarily provided his cell
22 phone number to the defendant, the plaintiff provided “prior express consent” to
23 receiving a “call.” *See, e.g., Emanuel v. Los Angeles Lakers, Inc.*, No. CV 12-9936-
24 GW(SHx), 2013 WL 1719035 at *2-4 (C.D. Cal. April 18, 2013)(where plaintiff sent
25 a text message to defendant, plaintiff consented to be contacted by defendant at the
26 number he texted from); *Ibey v. Taco Bell Corp.*, 2012 U.S. Dist. LEXIS 91030, *7-8
27 (S.D. Cal. June 18, 2012) (plaintiff had “expressly consented” to being contacted by
28 defendants when he sent defendant a text message); *Pinkard v. Wal-Mart Stores, Inc.*,
2012 U.S. Dist. LEXIS 160938, *8-16 (N.D. Ala. Nov. 9, 2012) (plaintiff expressly
consented to receiving a text message from defendant by providing defendant her cell
phone number).

1 *Brev of Howell, Inc.*, No. 10-10085, 2013 WL 1721150, at *18 (E.D. Mich. Apr. 22,
 2 2013) (denying certification for lack of ascertainability where the definition yielded
 3 multiple plaintiffs stemming from one potential fax transmission); *Jamison v. First*
 4 *Credit Servs., Inc.*, No. 12-C-4415, 2013 WL 1248306, at *15-16 (N.D. Ill. Mar. 28,
 5 2013) (denying certification for lack of ascertainability where the class definition
 6 included thousands of individuals who consented to receiving calls on their cellular
 7 telephones and thus had no grievance under the TCPA); *Vandervort v. Balboa*
 8 *Capital Corp.*, 287 F.R.D. 554, 558-59 (C.D. Cal. 2012) (class was unascertainable
 9 because the proposed class definition required determining who consented to receive
 10 advertisements); *Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, 274 F.R.D. 229, 234-
 11 35 (S.D. Ill. 2011) (class definition was overbroad and not ascertainable because the
 12 definition required determination of who consented to receiving calls).

13 For example, in a case decided this month, the United States District Court for
 14 the Central District of California denied class certification, finding that the class was
 15 not ascertainable because the plaintiff's class definition "would require individual
 16 inquiry into whether the potential class members consented to receiving text
 17 messages." *Gannon*, 2013 WL 2450199 at *2. There, the plaintiff sought to certify a
 18 class consisting of all persons who "received one or more unauthorized text messages
 19 sent by or on behalf of Defendants." *Id.* Defendants submitted evidence that "some
 20 of the recipients may have consented, because callers were explicitly informed that
 21 they may be contacted by the company at the number from which they had been
 22 called and provided an opportunity to opt-out of receiving such contact." *Id.* The
 23 court found certification "improper" because these facts would require the court to
 24 hold "mini-trials" to determine who received unauthorized text messages in order to
 25 determine class membership. *Id.* at *3.

26 HGV submits even more compelling evidence that the Hilton family members
 27 in the proposed putative class consented to the calls, requiring denial of class
 28 certification. In this case, the proposed class definitions would require the Court to

1 make the following impermissible determinations of merit: whether individuals were
 2 called on their cell number; whether HGV used an ATDS; whether individuals
 3 consented by voluntarily providing their cell numbers to Hilton; whether individuals
 4 consented when joining the HHonors Program and agreeing to its Terms and
 5 Conditions and Hilton's Global Privacy Policy; and whether individuals consented
 6 when making reservations and/or providing their cell numbers at check in and
 7 agreeing to Hilton's Global Privacy Policy.

8 Plaintiffs attempt to cure this issue by defining the class to exclude those
 9 individuals who provided consent. Courts call these "fail-safe" classes and have
 10 rejected certification of these claims on the grounds that they impermissibly base
 11 class membership on the ability to bring a successful claim on the merits. *See*
 12 *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 825-26 (7th Cir. 2012).
 13 Such a definition is inconsistent with Rule 23(c)(3), which provides in part that a
 14 judgment adverse to the class will bind all class members. A class definition must be
 15 rejected where it requires that a plaintiff either wins or, by virtue of losing, is defined
 16 out of the class and is therefore not bound by the judgment. *Messner*, 669 F.3d at
 17 825; *see also Vandervort*, 287 F.R.D. at 557. These definitions go to the heart of
 18 whether each class member has a meritorious claim under the TCPA. Defining the
 19 purported class as all persons who received a call "without their express consent"
 20 requires addressing the central issue of liability to be decided in this case. *See*
 21 *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D.Pa. 1995).

22 **B. Plaintiffs Fail To Satisfy All The Requirements Of Rule 23(a)**

23 **1. Plaintiffs Failed to Demonstrate That There Are Questions**
 24 **Common to the Putative Class Resulting In Common Answers**

25 The commonality element of Rule 23(a) requires Plaintiffs to prove that the
 26 putative classes not only suffered a violation of the same provision of law, but that
 27 they suffered the same injury. *Dukes*, 131 S. Ct. at 2551. Plaintiffs must also
 28 demonstrate that the class's injuries "depend upon a common contention" that is

1 “capable of classwide resolution.” *Id.* at 2545. Determination of the common
 2 contention’s truth or falsity must resolve an issue that is central to the validity of each
 3 one of the claims in one stroke. *Id.* Plaintiffs’ ability to raise common questions—
 4 even in droves—is irrelevant. The classwide proceeding must generate common
 5 answers apt to drive the resolution of the litigation. *Id.* at 2551. Dissimilarities
 6 within the proposed class “impede the generation of common answers.” *Id.* Here,
 7 the issue of consent prevents a finding that the class’s injuries are capable of a
 8 classwide resolution.

9 Courts have repeatedly held that TCPA cases involving similar facts are not
 10 appropriate for certification based on the failure of commonality, typicality and
 11 predominance of individual issues.¹⁰ Here, liability can only be established if HGV
 12 called putative class members’ cell numbers using an ATDS *without the recipient’s*
 13 *prior express consent.* See 47 U.S.C. § 227(b)(1)(A)(iii). Commonality is not
 14 present because the ways in which potential class members voluntarily provided their
 15 consent varies greatly. For instance, some individuals agreed to HHonors Terms and
 16 Conditions, some voluntarily provided their cell numbers during stays at Hilton
 17 properties, and others specifically requested information about HGV opportunities.
 18 Therefore, the Court will need to determine a series of individualized issues with
 19 respect to the proposed classes, including whether:

- 20 • Voluntarily providing a cell number in connection with HHonors
 21 applications or reservations/check in constitutes express consent;

22
 23 ¹⁰ See, e.g., *Gene and Gene, LLC v. BioPay, LLC*, 541 F.3d 318, 328 (5th Cir. 2008)
 24 (denying certification where numbers were acquired over time through a variety of
 25 factually different scenarios requiring individual inquiries concerning consent); *G.M.*
 26 *Sign, Inc. v. Brinks Mfg. Co.*, No. 09-C-5528, 2011 WL 248511, at *8 (N.D. Ill. Jan.
 27 25, 2011) (individualized issues predominated where defendant set forth individual
 28 facts concerning express consent); *Versteeg v. Bennett, Deloney & Noyes, P.C.*, 271
 F.R.D. 668, 674 (D. Wyo. 2011) (TCPA claims require extensive factual inquiries
 concerning express consent and the manner in which wireless numbers are provided).

- 1 • Online applicants to the HHonors Program consented to receiving
2 calls when they voluntarily provided their cell numbers and clicked a
3 box agreeing to the HHonors Terms and Conditions;
- 4 • Paper applicants to the HHonors Program consented to receiving calls
5 when they voluntarily provided their cell numbers and were advised
6 of the HHonors Terms and Conditions and that the Hilton Brands
7 would contact them by telephone with special offers and promotions;
- 8 • Telephone applicants to the HHonors Program consented to receiving
9 calls when they voluntarily provided their cell numbers in a
10 conversation with no script informing the applicant of the HHonors
11 Terms and Conditions;
- 12 • Online reservation guests consented to receiving calls when they
13 were advised of the Global Privacy Policy prior to voluntarily
14 providing their cell number and again in a confirmation email;
- 15 • Telephone reservation guests consented to receiving calls when they
16 voluntarily provided their cell number in an unscripted conversation
17 that did not notify them of the Global Privacy Policy and may or may
18 not have received a confirmation email;
- 19 • OTA and/or travel agent guests consented to receiving calls when
20 they booked reservations subject to their travel agents' terms and
21 conditions and/or privacy policies and did not provide their contact
22 information directly to the Hilton Brands and may or may not have
23 received notice of Hilton's Global Privacy Policy;
- 24 • Persons who made reservations through third parties consented to
25 receiving calls if the third party provided the number but may or may
26 not have informed the guest of Hilton's Global Privacy Policy; and
- 27 • Hilton Guests consented to receiving calls when they provided a cell
28 number at check in, in an unscripted conversation where they may or
may not have been advised of Hilton's Global Privacy Policy.

Even the gripes posted on the Internet that Plaintiffs impermissibly cite, Ptf's. Mot. 3:9-4:13; 5:22-7:10, establish that certain guests consented to the calls. These posts unequivocally demonstrate the lack of commonality in the proposed classes confirming the guests' consent to the calls. Gust Decl. Exh. V, HGV4261-4262. For example, one such customer "complaint" involved a customer who believed that the vacation offer seemed "too good to be true" and expressly requested that HGV call him to present the deal again:

His concern was over a marketing call he received last night . . . The guest questioned whether [the HGV caller] was really from HGV, so [the HGV caller] had him call back at his extension, dialing the # found

1 on the website, and it did get him back to [the HGV caller]. However,
 2 he still *felt the deal was too good to be true. He would like to check the*
 3 *validity of the deal, and if it's valid, he'll be happy to purchase the deal*
... I also told him that we would get back to him either way, which he
requested.

4 Gust Decl. Exh. V, HGV4261-4262.

5 Certification must be denied for lack of commonality where there is “no class-
 6 wide basis for distinguishing which recipients gave consent and which did not.”
 7 *Gene and Gene, LLC v. BioPay, LLC*, 541 F.3d 318, 328 (5th Cir. 2008). Here, the
 8 facts compelling denial of certification are even stronger than *Gene*. Similar to *Gene*,
 9 HGV has proven that the numbers it called were “collected over time and from a
 10 variety of sources.” *Id.*, at 328-29. The undisputed records and testimony provide
 11 that Hilton Guests and HHonors Members voluntarily provided their cell numbers in
 12 a variety of ways, including: HHonors Applications made online, in paper and over
 13 the phone; reservations made online, over the phone, through OTAs, travel agents
 14 and third parties; and the check in process. Like *Gene*, HGV has the “compelling
 15 argument.” The myriad of ways that Hilton Guests and HHonors Members consented
 16 to being called by providing Hilton with their cell numbers completely undermines
 17 Plaintiffs’ argument regarding commonality.

18 In fact, Plaintiffs’ motion completely ignores the myriad of ways in which
 19 potential class members consented by voluntarily providing their cell numbers.
 20 These ways include: joining the HHonors Program, staying at a Hilton property,
 21 checking in, and requesting information about HGV. Plaintiffs cite to five inapposite
 22 cases wherein *all the numbers* were obtained in the *exact same manner*. *See, e.g.*,
 23 *Manno v. Healthcare Revenue Recovery Grp.*, No. 11-61357, 2013 WL 1283881, at
 24 *8 (S.D. Fla. Mar. 26, 2013) (all numbers were acquired from the hospital admissions
 25 process); *Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292, 293 (N.D. Cal. 2013) (all
 26 numbers were acquired from one third party marketing database); *Siding & Insulation*
 27 *Co. v. Beachwood Hair Clinic, Inc.*, 279 F.R.D. 442, 444 (N.D. Ohio 2012) (all
 28

1 numbers were obtained from one third party marketing firm); *Mitchem v. Illinois*
 2 *Collection Serv., Inc.*, 271 F.R.D. 617, 620 (N.D. Ill. 2011) (all numbers were
 3 obtained from a health care provider); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642,
 4 647 (W.D. Wash. 2007) (all numbers were obtained from the same commercial
 5 database).

6 By contrast, there is no uniform manner in which HHonors Members or Hilton
 7 Guests provide their cell numbers to Hilton. Where numbers are collected over time
 8 and from a variety of sources, class certification must be denied. *Gene*, 541 F.3d at
 9 328. Here, unlike the cases relied on by Plaintiffs, the putative class members
 10 consented to being called by voluntarily providing their cell numbers over time in a
 11 variety of ways. Therefore, class certification must be denied.

12 2. Plaintiffs' Claims Are Not Typical of the Putative Class

13 Members

14 In order to satisfy the typicality requirements of Rule 23(a)(3), Plaintiffs must
 15 prove the claims of the entire proposed nationwide class they seek to represent by
 16 proving their own claims. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020-21 (9th
 17 Cir. 1998). Plaintiffs' claims do not cover the vast and varied situations experienced
 18 by potential class members. On one hand, Mr. Connelly is a HHonors Member, who
 19 applied online, made all of his hotel reservations online, and provided the Hilton
 20 Brands with the cell number on which he allegedly received calls. On the other hand,
 21 Mr. Merritt is not a HHonors Member, made his hotel reservations over the phone
 22 and through a third party, and provided the Hilton Brands with the cell number on
 23 which he allegedly received calls in connection with those reservations.

24 Plaintiffs' experiences are not reasonably co-extensive or even remotely
 25 similar to one another, let alone a significant portion of the nationwide subclasses
 26 they seek to represent. The broader potential proposed class includes: persons who
 27 ported their landline telephone number to a cellular telephone number; persons who
 28 utilized call forwarding to answer calls on their cellular phone; persons who utilized

VoIP services; persons who mistakenly identified HGV as the entity calling them; paper HHonors applicants; telephone HHonors applicants; Hilton Guests who made reservations through OTAs or travel agents; and Hilton Guests who provided their cell number to the Hilton Brands during the check in process for the first time.

C. Plaintiffs Fail To Meet The Requirements of Federal Rule of Civil Procedure 23(b)(3)

1. Plaintiffs Fail To Demonstrate That Common Questions Predominate

Rule 23(b)(3) requires a proposed class representative to demonstrate that “questions of law or fact common to class members *predominate* over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3) (emphasis added). Although similar to the commonality requirement of Rule 23(a), the Rule 23(b)(3) requirement is “far more demanding because it tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Gene*, 541 F.3d at 326. In evaluating predominance under Rule 23(b)(3), this Court must identify the substantive issues that will control the outcome, assess which issues will predominate, and then determine whether those issues are common to the class or will result in the degeneration of the case into a series of individual trials.

The substantive issues that will control the outcome of this case are whether members of the proposed classes received calls on their cell numbers, from an ATDS, without consent. As described above, each of these inquiries turns on various circumstances unique to each putative class member’s interactions with Hilton. Resolution of each of these substantive issues will degenerate into a series of individual trials. Therefore, predominance is not met and this case is not suitable for certification. *G.M. Sign, Inc.*, No. 09-C-5528, 2011 WL 248511, at *8-10 (N.D. Ill. Jan. 25, 2012) (issues of consent predominated over common issues precluding certification in a TCPA case); *Versteeg*, 271 F.R.D. at 674 (TCPA would require extensive individual fact inquiries regarding consent that predominated over common

1 issues).

2 2. Plaintiffs Fail To Demonstrate That A Class Action Is the 3 Superior Method Of Adjudication

4 Certification should be denied because adequate incentives exist for individuals
5 to prosecute their claims, and on the ground that a class certification would result in
6 enormous damages, completely out of proportion to any harm suffered by the
7 plaintiff. *See London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir.
8 2003). The TCPA provides adequate incentives for individuals to prosecute their
9 claims and, therefore, certification is not the superior method of adjudicating this
10 case. *Freedman v. Advanced Wireless Cellular Commc'ns., Inc.*, No. SOM-L-611-
11 02, 2005 WL 2122304, at *2 (N.J. Super. Ct. June 24, 2005) (vacating TCPA class
12 certification, noting significant legislative history evidencing that class actions were
13 not intended under the TCPA). “The drafters [of the TCPA] recognized that damages
14 from a single violation would ordinarily amount only to a few pennies worth of ink
15 and paper usage, and so believed that the \$500 minimum damage award would be
16 sufficient to motivate private redress of a consumer’s grievance through a relatively
17 simple small claims court proceeding, without an attorney.” *Levine v. 9 Net Ave.,*
18 *Inc.*, No. A-1107-00T1, 2001 WL 34013297, at *1 (N.J. Super. App. Div. June 7,
19 2001); *Forman*, 164 F.R.D. at 404 (the TCPA is designed to provide adequate
20 incentive for an individual plaintiff to bring suit). In other words, “[a] class action
21 would be inconsistent with the specific and personal remedy provided by Congress to
22 address the minor nuisance of unsolicited facsimile advertisements.” *Forman*, 164
23 F.R.D. at 405; *Murphey v. Lanier*, 204 F.3d 911, 913 (9th Cir. 2000) (TCPA claims
24 should be treated as “small claims best resolved in state courts”), *abrogated on other*
25 *grounds by Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).

26 In addition, class treatment fails to meet the “superiority” requirement because
27 HGV’s liability “would be enormous and completely out of proportion to any harm
28

1 suffered by the plaintiff.” *London*, 340 F.3d at 1255 n.5.¹¹ For example, the court in
 2 *Forman* emphasized that statutory damages of \$500 per violation exceeded any actual
 3 monetary loss or lost time suffered by plaintiffs and that the \$500 damages available
 4 under the TCPA were sufficient. *Forman*, 164 F.R.D. at 404-05. The court found the
 5 \$500 damages provided for in the TCPA were sufficient “to provide adequate
 6 incentive for an individual plaintiff to bring suit on his own behalf” and obviate the
 7 need for the class action mechanism. *Id.* at 404.

8 Plaintiffs seek to recover statutory damages on behalf of a class that far exceed
 9 any actual damages suffered. Although Plaintiffs have refused to provide HGV with
 10 a statement of their actual damages, their damages are nominal or non-existent. For
 11 the months in which both Mr. Merritt and Mr. Connelly received calls from HGV,
 12 their regular cell phone bills collectively totaled less than \$1,000 dollars.¹² These
 13 amounts comprise all fees payable by Plaintiffs for their cellular plans and are not
 14 attributable to any calls from HGV. Plaintiffs did not incur any additional charges as
 15 a result of HGV’s calls. Even if this Court includes the “annoyance” of receiving
 16 marketing calls from a hotel brand both Plaintiffs trust, their actual damages pale in
 17 comparison to the \$10,000 to \$21,000 that Plaintiffs could recover pursuant to the

18
 19 ¹¹ See, e.g., *Legge v. Nextel Commc’ns, Inc.*, No. CV-02-867 DSF (VNKX), 2004 WL
 20 5235587, at *13 (C.D. Cal. June 25, 2004) (denying certification where statutory
 21 damages ranged from \$150 million to \$1.5 billion); *Blanco v. CEC Entm’t Concepts*
 22 *L.P.*, No. EDCV-07-90-ODW (COPx), 2008 WL 239658, at *2 (C.D. Cal. Jan. 10,
 23 2008) (denying certification of class seeking damages of \$1.9 billion); *In re Trans*
 24 *Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350-51 (N.D. Ill. 2002) (denying class
 25 certification where statutory damages exceeding \$19 billion were “grossly
 disproportionate to any actual damage”); *Wilson v. Am. Cablevision of Kansas City,*
Inc., 133 F.R.D. 573, 578-79 (W.D.Mo. 1990) (denying certification where plaintiff
 sought class damages of up to \$27 billion).

26 ¹² Mr. Connelly’s cellular phone bill was roughly \$185.00 per month when he
 27 received HGV’s calls. Mr. Merritt’s phone bill was approximately the same when he
 28 received HGV’s calls. Neither Plaintiff exceeded their minutes because of HGV’s
 calls. Taken together, Plaintiffs actual damages are less than \$1,000.

1 statutory damages provisions of the TCPA. The absurdity of the damages sought
 2 becomes even clearer when damages are aggregated across the entire nationwide
 3 class, yielding a potential damage award of between \$18 and \$57 billion.

4 Plaintiffs' effort to seek tens of billions of dollars in statutory damages, based
 5 on little or no actual or at best miniscule harm, "shock[s] the conscience" and cannot
 6 support the certification of a class. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226,
 7 234-35 (9th Cir. 1974) (potential damages awards that "shock the conscience" require
 8 denial of class certification under Rule 23(b)(3)). The superior mechanism for
 9 resolving Plaintiffs' claims is not a class action, but rather individual actions brought
 10 by persons who truly wish to end the calls they are receiving from HGV. Individual
 11 actions, not a lawyer-driven class action, are the superior method for Plaintiffs to
 12 pursue any claims they may have.

13 **D. Plaintiffs' Request For Certification Under Rule 23(b)(2) Lacks**
 14 **Merit**

15 This Court may not certify a class under Rule 23(b)(2) unless the ultimate
 16 relief sought relates exclusively or predominantly to money damages. Fed. R. Civ. P.
 17 23(b)(2), Advisory Comm. Note (1966); *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168,
 18 1186 (9th Cir. 2007). In evaluating a Rule 23(b)(2) class, courts must examine the
 19 specific facts and circumstances and focus predominantly on the plaintiff's intent in
 20 bringing the suit. *Id.* The court must find that the predominant relief is injunctive
 21 and declaratory, while monetary damages are secondary. *Zinser v. Accufix Research*
 22 *Inst., Inc.*, 253 F.3d 1180, 1195, *as amended*, 273 F.3d 1266 (9th Cir. 2001). It is the
 23 plaintiff's burden to show that monetary damages are merely incidental to a primary
 24 request for injunctive relief. *Blackwell v. Skywest Airlines, Inc.*, 245 F.R.D. 453, 466
 25 (S.D. Cal. 2007). It is not sufficient that injunctive relief be among the remedies
 26 sought where the realities of litigation make clear that the suit was brought primarily
 27 for money damages. *Elliott v. ITT Corp*, 150 F.R.D. 569, 576 (N.D. Ill. 1992). The
 28 Supreme Court has expressed "growing concerns regarding the certification of

1 mandatory classes when monetary damages are involved.” *Ticor Title Ins., Co. v.*
 2 *Brown*, 511 U.S. 117, 121 (1994) (stating that there is “at least a substantial
 3 possibility” that actions seeking monetary damages are only certifiable under Rule
 4 23(b)(3)).

5 Plaintiffs seek statutory damages in the amount of \$500 per negligent violation
 6 and \$1,500 for each willful and/or knowing violation of the TCPA. Plaintiffs have
 7 repeatedly argued to this Court that HGV dialed approximately 37 million telephone
 8 calls during the statutory period. Based on this number, a potential judgment in this
 9 case could range from \$18 to \$57 billion dollars, a number that shocks the
 10 conscience. When Plaintiffs’ claim for billions of dollars of damages is compared to
 11 their assertion that they were “fed up with these annoying telemarketing calls,” it
 12 becomes clear that the primary remedy sought in this case is damages. Significantly,
 13 Plaintiffs have spent little time addressing injunctive relief. Instead, Plaintiffs focus
 14 most of their time and efforts on the monetary value of this case. This demonstrates
 15 that this lawsuit does not achieve the desired results of a proper class action.

16 **IV. CONCLUSION**

17 For all the reasons stated above, HGV respectfully requests that this Court
 18 deny Plaintiffs’ motion for class certification.

19 Dated: June 14, 2013

Respectfully submitted,

20 LINER GRODE STEIN YANKELEVITZ
 21 SUNSHINE REGENSTREIF & TAYLOR LLP

22 By: s/ Angela C. Agrusa

23 Angela C. Agrusa
 24 Attorneys for Defendant
 25 HILTON GRAND VACATIONS
 26 COMPANY, LLC
 27
 28

1 Randall J. Sunshine (SBN 137363)
rsunshine@linerlaw.com
2 Angela C. Agrusa (SBN 131337)
aagrusa@linerlaw.com
3 Sterling L. Cluff (SBN 267142)
scluff@linerlaw.com
4 LINER GRODE STEIN YANKELEVITZ
SUNSHINE REGENSTREIF & TAYLOR LLP
5 1100 Glendon Avenue, 14th Floor
Los Angeles, California 90024
6 Telephone: (310) 500-3500
Facsimile: (310) 500-3501
7
8

9 **CERTIFICATE OF SERVICE**

10 I hereby certify that on June 14, 2013, I electronically filed the foregoing with
11 the Clerk of the Court using the ECF System which sent notification of such filing
12 to the following:

13 Charles T. Mathews, Esq.
14 George S. Azadian, Esq.
Zack I. Domb, Esq.
15 Mathews Law Group
37 E. Huntington Drive, Suite A
16 Arcadia, California 91006
Telephone: (626) 683-8291
17 Facsimile: (626) 8295
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